92-1438

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEO HAVILAND,

Petitioner,

vs.

J. ARON & CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conflict among the Circuit Courts of Appeal -- as to whether a RICO conspiracy plaintiff has standing to sue if he is injured not by a predicate act of racketeering but by an overt act in furtherance of the conspiracy -- should be resolved by this Court?

2. Whether a terminated employee has standing to sue under 18 U.S.C. § 1962(c) when he alleges that he was a direct victim of mail fraud, wire fraud, and extortion schemes?

LIST OF PARTIES

Apart from parties named in the caption, Goldman, Sachs & Co. had been a party to the proceedings in the District Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES i

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

JURISDICTION IN THE ORIGINAL COURT 11

REASONS FOR GRANTING THE WRIT 11

THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS OVER WHEN A PRIVATE CIVIL PLAINTIFF HAS STANDING TO BRING A CLAIM BASED UPON A VIOLATION OF THE RICO CONSPIRACY STATUTE 11

THE LOWER COURTS ERRONEOUSLY ADOPTED AN UNDULY RESTRICTIVE RICO STANDING REQUIREMENT WHICH BARS TERMINATED EMPLOYEES FROM EVER SUING UNDER RICO 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Cullom v. Hibernia National Bank,
859 F.2d 1211 (5th Cir. 1988) 16

Hecht v. Commerce Clearing House,
897 F.2d 21 (2d Cir. 1990) 3, 4, 8-11, 15, 16

Holmes v. Securities Investor Protection Corporation, ___ U.S. ___, 112 S.Ct. 1311 (1992) 17

Miranda v. Ponce Federal Bank,
948 F.2d 41 (1st Cir. 1991) 15

Norman v. Niagara Mohawk Power Corp.,
873 F.2d 634 (2d Cir. 1989) 16

O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) 16

Pujol v. Shearson/American Express, Inc., 829 F.2d 1201 (1st Cir. 1987) 16

Reddy v. Litton Industries, Inc.,
912 F.2d 291 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 332 (1991) 15

Reddy v. Litton Industries, Inc.,
___ U.S. ___ , 112 S.Ct. 332 (1991) 3, 10

Schiffels v. Kemper Financial Services, Inc., 978 F.2d 344 (7th Cir. 1992) 3, 13-15

Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3rd Cir. 1989) 3, 10, 12-15

Statutes and Rules:

18 U.S.C. § 1964 . . . . . 2, 11, 14

18 U.S.C. § 1962 . . . . . i, 2, 10, 12-15

28 U.S.C. § 1254 2

No.: _____

IN THE

Supreme Court Of The United States

October Term, 1992

LEO HAVILAND,

Petitioner,

-against-

J. ARON & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Leo Haviland respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 3, 1992, affirming the District Court's dismissal of his complaint brought pursuant to the RICO statute.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reprinted in the Appendix at pages A-1 to A-2. The initial opinion of the District Court appears in the Appendix at pages A-3 to A-17.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 3, 1992, and this petition for a writ of certiorari has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 1962(c) states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) states:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964(c) states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Leo Haviland petitions this Court following the affirmance of the District Court's dismissal of his RICO complaint on the ground that he lacked standing to pursue his claims. There can be no doubt, though, that Haviland would have been permitted to pursue his RICO conspiracy claim had he been so fortunate as to have been able to commence suit in a Third Circuit or Seventh Circuit district court. *See Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-70 (3rd Cir. 1989); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 348-51 (7th Cir. 1992). However, since venue lay only in the Southern District of New York, the contrary rule set forth in *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25-26 (2d Cir. 1990), required dismissal of the complaint. Under these circumstances, this Court should adopt the view expressed by Justice White in *Reddy v. Litton Industries, Inc.*, ___ U.S. ___ , 112 S.Ct. 332 (1991), and resolve the "conflict [which] exists among the Courts of Appeals on this important federal question...."

Alternatively, this case requires the Court to decide whether a plaintiff may be denied his opportunity to pursue a properly pleaded RICO claim because the ultimate injury suffered as a result of the defendant's wrongdoing was the plaintiff's loss of his job. Here, the courts below concluded that petitioner had, through the use of "creative pleading," managed to file a "whistleblower's" complaint that facially met the requirements of the RICO statute. In this petition, we will demonstrate that the complaint is not a standard "whistleblower's" complaint, and that petitioner has pleaded a RICO claim that should have survived respondent's motion to dismiss the complaint.

In essence, the lower courts sought to place a square peg into a round hole here. Focusing fundamentally upon the

fact that petitioner was terminated in his employment, the courts below concluded that this case is governed by a line of wholly inapposite cases. These cases hold that an employee terminated for failing to participate in racketeering *directed against others* does not have standing under RICO. *See, e.g., Hecht v. Commerce Clearing House, Inc. supra.* In contrast, the complaint here alleges that respondent schemed to defraud and attempted to extort *petitioner himself*, and that petitioner suffered a variety of damages, including loss of opportunity to pursue other lucrative offers of employment, injury to his reputation, unwarranted reduced compensation, and loss of his job.

That illegal activity by respondent J. Aron & Co. ("Aron"), in conspiracy with former defendant Goldman Sachs & Co. ("Goldman"), ultimately ended in the firing of petitioner does not thereby magically remove petitioner's actions from the purview of the RICO statute. Yet, affirming the dismissal of this complaint would require the Court to accept the proposition that an employer may escape all liability for injuring an employee through violation of the RICO statute simply by firing that employee after the racketeering activity is complete. To state this proposition is to reject it. Yet, it is the inexorable result which flows from the rulings of the courts below.

STATEMENT OF THE FACTS

THE COMPLAINT'S ALLEGATIONS

Leo Haviland joined Goldman in 1979. In 1982, Haviland created and became head of the Energy Futures and Options Group ("Energy Futures"), a part of the Futures Services Department of Goldman's Fixed Income Division. On or about April 26, 1984, Goldman made Haviland a vice

president. He was not just another Goldman employee. Rather, he had high managerial and executive responsibilities. From 1984 until the termination of his employment in January or February of 1989, throughout the schemes to extort and defraud him, Haviland functioned as the Goldman vice president in charge of Energy Futures. In this capacity, he traded in energy futures as well as options on energy futures ("futures options") on behalf of large refining and marketing firms, energy producers, and oil trading companies. Haviland's efforts led him to be entrusted with extensive, exclusive, and confidential knowledge about the needs, plans, and strategies of important players in the energy market, who were his and Goldman's customers. As a result, Goldman earned huge profits from both commissions on trades executed by Haviland and Energy Futures, as well as interest on monies deposited by Haviland's customers with Goldman so that they could trade on margin.

In addition to Haviland's efforts, Goldman increased its level of participation in the energy market by its 1984 decision to have respondent Aron, a partnership consisting of all Goldman partners, act as a principal in the energy futures, options, forwards and physical delivery markets. Pursuant to this decision, Aron would purchase and/or sell futures, options, forwards, and actual commodities for itself, and then hope to trade them at a profit. It would also act as a market maker. Given the nature of Aron's business, access to petitioner's confidential information about the trading, purchase, and sale plans of his significant clients would be of tremendous value to Aron. For example, if Aron had advance knowledge that one of Haviland's customers planned to purchase a substantial amount of oil at $20 a barrel, Aron could make an effort to corner the market at that $20 price, and then have the oil available for sale at perhaps $20.25 a barrel when Haviland's customer sought to make its purchase.

The monies involved in the energy futures and futures options markets are tremendous, and even minute fluctuations in price can result in immense profits or losses. Given the high stakes, Goldman's decision to use Aron in the energy markets created great concern on the part of Haviland and his clients at Energy Futures. In addition, Haviland expressed grave doubts about his ability to maintain what had previously been a sterling reputation for honesty and confidentiality in the energy business. Confidentiality and anonymity were *unequivocal* conditions of Haviland's relationships with his clients, and crucial to his efforts to attract new clients.

Recognizing these concerns, Goldman made explicit, but false, promises to Haviland and, through Haviland and through direct misrepresentations, to his customers, that there would be no exchange of confidential customer information between Energy Futures and Aron. The sum and substance of each of the specific misrepresentations was that a "Chinese Wall" either would or did exist between Aron and Energy Futures, *i.e.*, that all Energy Futures' customers' confidences would be zealously kept from others, particularly Aron. Goldman made these misrepresentations knowing that they were false and intending to defraud Haviland into remaining at Goldman under the false belief that he would be permitted and encouraged to continue to act ethically. This scheme to defraud Haviland commenced in April of 1984, and continued into at least the Spring of 1987. As detailed in the complaint, there were numerous mailings and wire communications made in furtherance of this fraud.

Relying upon these misrepresentations, Haviland passed up significant opportunities for employment at firms which would have ultimately paid him more money and would have allowed him to conduct his business without pressure to divulge confidential information. Instead, over the ensuing years, Haviland found himself pressured to reveal

confidential information, denied appropriate compensation, and then fired.

In addition, from July of 1987 through January of 1989, Goldman and Aron made repeated attempts to extort Haviland into divulging confidential information to Aron. Each of these attempts was rebuffed by Haviland. Thereafter, Goldman made good on its threats. Notwithstanding the fact that Haviland had steadily increased profits at Energy Futures, he was denied appropriate salary increases in 1987 and 1988. And then, in late January or early February 1989, he was summarily dismissed in violation of Goldman's own published termination policies.

Thus, the pattern of racketeering alleged here consists of two separate but related schemes. The first part of the racketeering consisted of a scheme to defraud Haviland into staying at Goldman, thereby passing up valuable opportunities for other employment at a time when he was most marketable, by misrepresenting to him that the "Chinese Wall" would be honored. In the complaint, Haviland alleges that this misrepresentation, upon which he relied, was made to him at least twelve times over a two and one-half year period from April of 1984 through November of 1986. In furtherance of this fraud *upon petitioner*, Haviland, with Goldman's express approval, innocently communicated this misrepresentation, by mail or wire, on at least 339 occasions over the one and one-half year period between October of 1984 and March of 1986. Also in furtherance of this scheme, Goldman mailed out literally thousands of publications and letters containing the misrepresentation during the almost three year period between March 1984 and February 1987.

As the complaint makes clear, all of these mail and wire communications, even though made to Goldman customers rather than to Haviland, served to further the fraud upon petitioner by, supporting Aron's and Goldman's

misrepresentation that they would erect and honor a "Chinese Wall" between the two businesses.

The second component of Aron's racketeering activity was its agreement with Goldman to have Goldman extort (unsuccessfully it turned out) Haviland into ignoring the "Chinese Wall" and impart confidential information to defendant. During the fifteen month period between July of 1987 and November of 1988, seven such attempts were made, two of which involved a reduction in the compensation to which Haviland was rightfully entitled. It was only after these illegal extortionate efforts failed that Haviland was fired.

Thus, while Haviland contends that, as a factual matter, his termination by Goldman was wrongful, he is not suing upon this claim. Rather, he urges the entirely separate argument that Aron, in conspiracy with Goldman, injured him directly by violation of the federal criminal laws.

THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT

The District Court, relying upon cases such as *Hecht v. Commerce Clearing House, Inc., supra*, dismissed the complaint upon a finding that "Haviland lacks standing to assert the [complaint's] RICO claims." (A-4)

With respect to Haviland's mail and wire fraud claims, the Court held that Haviland lacked standing, concluding that since "the alleged misrepresentations were made only to *clients* of Goldman..., any proximate injury resulting from this scheme would have been to those clients rather than plaintiff." (A-12) (Emphasis in original) Recognizing, though, that Haviland's complaint specifically alleges that a fraud was directed at him, the Court then went on to make a credibility

determination: "[C]rediting Haviland's interpretation of the facts would force us to accept that Goldman and Aron perpetrated thousands of violations of the mail and wire fraud statutes for the purpose of inducing Haviland to remain at Goldman." (A-13)

With respect to petitioner's extortion claims, the District Court, relying upon the *Hecht* line of cases, stated:

> Even assuming that Haviland's allegations could support multiple predicate acts of extortion, however, we find them insufficient to establish standing. In the first place, Haviland's insistence that he was the intended target of the scheme to obtain confidential information is simply belied by his concession that "defendant's ultimate goal was surely to defraud Goldman's *customers*." Pl. Mem. at 24. Whether or not plaintiff was the necessary source of such information, therefore, any proximate injury resulting from the alleged extortion would have been to Goldman's clients, and Haviland's own injuries would have been attributable to his refusal to participate in the allegedly fraudulent scheme. Since that type of injury is clearly insufficient to confer standing under the *Hecht* line of cases, Haviland's argument must fall.

(A-14)

In addition, the District Court also went on to conclude -- erroneously -- that the extortion claims could not survive because they represented

> a conscious attempt to plead around the holdings of the "refusal to cooperate" cases.... In short, the difficulty we have with crediting Haviland's assertion that the Hobbs Act allegations distinguish his case from the *Hecht* cases is that every one of the latter cases could also have been pled in this manner.

(A-15/16)

In so ruling, the District Court understandably did not address one additional claim raised by Haviland: that, even construing the complaint as a mere whistleblower's complaint, Haviland had standing under 18 U.S.C. § 1962(d) because his termination was an overt act in furtherance of the alleged conspiracy to defraud Goldman's customers. Thus, Haviland's brief in the District Court stated:

> Plaintiff notes, however, that under the rule of *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989), the RICO conspiracy claim would stand even if the substantive RICO claims falls. *Shearin*, however, was rejected by the Second Circuit in *Hecht*. 897 F.2d at 25-26. Given the split among the Circuit Courts, *see Reddy v. Litton Industries, Inc., supra*, ___ U.S. ___, 112 S. Ct. 332 (1191) (White, J., dissenting from denial of certiorari), we raise this issue for possible Supreme Court review.

THE OPINION OF THE COURT OF APPEALS

In an unpublished memorandum opinion, the Court of Appeals affirmed the District Court ruling, concluding that "[p]laintiff's efforts to distinguish ... *Hecht* ... are unpersuasive." (A-2)

This petition follows.

JURISDICTION IN THE ORIGINAL COURT

The basis for jurisdiction in the District Court was 18 U.S.C. § 1964 and principles of pendent jurisdiction.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS OVER WHEN A PRIVATE CIVIL PLAINTIFF HAS STANDING TO BRING A CLAIM BASED UPON A VIOLATION OF THE RICO CONSPIRACY STATUTE

Had Leo Haviland been able to bring his action in a district court of the Third or Seventh Circuit, his law suit would now be moving forward to trial. This is so because even if one construes the complaint -- erroneously, we contend -- as alleging that Haviland was merely a casualty of Goldman's and Aron's scheme to defraud Goldman's customers, governing law in the Third and Seventh Circuits would permit Haviland to recover under a RICO conspiracy theory. In these circuits, a RICO plaintiff need allege only an injury from an overt act taken in furtherance of a RICO conspiracy. There is no requirement that the plaintiff be

injured by an actual predicate act. Hence, even if, as the lower courts concluded, Goldman's and Aron's predicate racketeering activity had been directed only at Goldman's customers, the firing of Haviland was nonetheless an overt act taken in furtherance of that conspiracy against Goldman's customers.

In *Shearin v. E.F. Hutton Group, supra*, the plaintiff claimed precisely that which the lower courts in this case concluded Haviland is claiming in his complaint: that she was fired by E.F. Hutton because she refused to participate in Hutton's alleged RICO scheme directed against its customers. With respect to Shearin's claim that Hutton had violated 18 U.S.C. § 1962(c), the Court concluded that Shearin had no standing because Hutton's alleged RICO predicate acts were directed against and calculated to harm only Hutton's customers: "If, therefore, the Hutton companies' predicate acts under section 1962(a) or (c) injured anybody, they injured those Hutton customers whom the securities scheme defrauded." 885 F.2d at 1168.

In contrast, though, the Court held that Shearin did have standing under 18 U.S.C. § 1962(d). The Court stated:

> But while the section 1962(a) and (c) violations she alleges injured only customers, that is not so with respect to the alleged section 1962(d) conspiracy. Shearin contends Hutton Trust hired her as window dressing to perpetuate the fraud that it was a legitimate company. She also claims that she was fired to preserve the same fraud when she stated she would not participate. These acts may not qualify as predicate acts for section 1962's first three subsections, but they do for the fourth. Shearin's hiring and firing plausibly constitute overt acts that not only would establish a

> conspiracy, but in this case were allegedly essential to it. Assuming that the hiring and firing were injuries, those injuries did occur "by reason of" the Huttons' violation of section 1962(d).
>
> * * *
>
> A pleading of investment, acquisition, or participation through a pattern of racketeering necessarily incorporates the prior racketeering activity in alleging RICO violations under section 1962(a), (b) or (c). That is not true of section 1962(d). Predicate acts for conspiracy do not of necessity consist of section 1961(1) racketeering activity. To the contrary, a conspiracy to commit the other RICO violations may occur absent the actual commission of the other violations or the racketeering activities that underpin them. All that need be shown is that the conspirators agreed to engage in a pattern of racketeering activity.... Acts that further a section 1962(d) conspiracy thus may cause harm even when they do not themselves qualify as racketeering activity. Taking into account all the provisions of section 1962, either racketeering activity or classic overt conspiracy acts may qualify as "predicate acts" to a RICO violation that causes injury.

885 F.2d at 1168-69 (citations omitted).

More recently, the Seventh Circuit agreed with *Shearin*. In *Schiffels v. Kemper Financial Services, Inc.*, *supra*, the Court correctly held:

> We conclude that the approach expounded in Shearin is the correct approach because it is consistent with RICO's unambiguous language and with traditional concepts of conspiracy law.... Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves.... Thus, while a conspiracy to violate RICO requires an agreement to commit a pattern of predicate acts..., it does not require that any predicate acts actually be committed.
>
> It is true that an agreement to violate RICO, standing alone, cannot harm anybody. Some act in furtherance of that agreement (an "overt act," in legal parlance) is necessary. However, since RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, see 18 U.S.C. § 1962(d), a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that § 1964(c) requires for standing to bring a civil RICO action.

978 F.2d at 348-49 (citations omitted).

In contrast to *Shearin* and *Schiffels*, the Courts of Appeals for the First, Second and Ninth Circuits have held

that there is no distinction, for standing purposes, between a claim under § 1962(c) and one under § 1962(d). In the view of these courts, only those plaintiffs injured by an actual racketeering act may sue under the RICO statute. *See Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48, n.9 (1st Cir. 1991); *Hecht v. Commerce Clearing House, supra*; *Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 332 (1991).

Given this clear, and growing, dispute among the Circuits, the issue should be resolved by this Court. Moreover, as explained in *Shearin* and *Schiffels*, it should be resolved in Haviland's favor. Put simply, it makes no sense to impose a "predicate act injury" standing requirement for a RICO conspiracy claim, given that commission of a predicate act is not an element of a § 1962(d) violation.

II

THE LOWER COURTS ERRONEOUSLY ADOPTED AN UNDULY RESTRICTIVE RICO STANDING REQUIREMENT WHICH BARS TERMINATED EMPLOYEES FROM EVER SUING UNDER RICO

In POINT I, *supra*, we argued that Haviland's RICO conspiracy claim should go forward even if one proceeds upon the lower courts' analysis of the complaint. In this POINT, we argue that the lower courts erred in that analysis of the complaint, and therefore erroneously concluded that Haviland lacks standing under § 1962(c).

Ultimately, this case turns on whether it is governed by the line of RICO cases dealing with the standing of a "whistleblower" under RICO. *See, e.g., Hecht v. Commerce*

Clearing House, Inc., supra; *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989); *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Cullom v. Hibernia National Bank*, 859 F.2d 1211 (5th Cir. 1988); *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201 (1st Cir. 1987).

The key question here is whether it may be said that defendant's alleged racketeering activity was the proximate cause of petitioner's alleged injuries. As the Court stated in *Hecht*, the test is whether the plaintiff's injury is "reasonably foreseeable as a natural consequence of the RICO violations." 897 F.2d at 24.

We do not challenge this underlying analysis, but instead argue that it has been misconstrued so as to exclude all terminated employees from bringing suit under the RICO statute. For in our view, application of the standard set forth in cases such as *Hecht* inexorably leads to the conclusion that Haviland has standing. The allegation here is that Aron, together with Goldman, schemed to defraud petitioner about the existence of a "Chinese Wall" so as to keep Haviland in Goldman's employ, and then sought to extort from him the very information that they had promised he could keep confidential. Plainly, Haviland's loss of the opportunity to seek employment elsewhere when he was at his most marketable, as well as the reduction or slowed increase in his salary as a result of his refusal to provide confidential information, were both reasonably foreseeable as a natural consequence of Aron's conduct. The same is true of Haviland's loss of his job and the damage to his reputation that flowed from the termination. Termination of employment is a natural consequence of threats that one will lose one's job if confidential information is not imparted.

The lower courts did not address this damage analysis. Instead they relied upon a long line of cases which hold that RICO cannot be used to recover damages where an employee is terminated for failure to participate in racketeering activity directed against *others*. However, none of these cases involved claims similar to those made by Haviland, *i.e.*, that he was the intended victim of defendant's racketeering. Moreover, all of these cases involve illegal activity being conducted by others, and termination of employment because the plaintiff either reported the misconduct or refused to participate. None of these cases involved a situation even remotely similar to the one here, where Aron's plan to obtain confidential information could only have been accomplished by Haviland's participation. Nor did any of these cases involve the extortion of clearly defined property, *i.e.*, confidential information, possessed by the plaintiff.

The real test here is what can the wrongdoer reasonably foresee when he embarks upon his illicit course of conduct. *See Holmes v. Securities Investor Protection Corporation*, ___ U.S. ___, 112 S. Ct. 1311 (1992). In the cases relied upon by the lower courts, injury to a particular employee plainly was not within the scope of events that the wrongdoer assumed would be the result of plans directed at others. The difference between the cases relied upon by the lower courts and the facts of the present case are obvious.

First, none of the plaintiffs in these cases alleged that the defendant had schemed directly to defraud the plaintiff. Here, the complaint alleges such a scheme.

Second, none of the plaintiffs in these cases alleged Hobbs Act violations directed at the plaintiff. Here, the complaint alleges such violations.

Third, and perhaps most important, in all of these cases there was ongoing illegal activity directed at others, and the plaintiff was punished for not joining in or reporting on that activity. Here, the illegal activity was actually directed at Haviland. While Aron's ultimate goal was surely to defraud Goldman's customers by secretly obtaining Haviland's confidential information, that goal could only have been accomplished by first succeeding in the plan (a) to defraud Haviland into staying at Goldman and (b) then extorting him into participating in planned illegal activity.

Viewed in this light, one can plainly see that Aron's illicit acts as to Haviland were separate and distinct from the fraud it anticipated putting into action against Goldman's customers. He should therefore be permitted to prove these allegations in court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

— — — — — — — —

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of December one thousand nine hundred and ninety-two.

Present: HONORABLE WILFRED FEINBERG,
HONORABLE AMALYA L. KEARSE,
Circuit Judges,
HONORABLE ROBERT F. PECKHAM,
District Judge*.

LEO HAVILAND,

Plaintiff-Appellant,

- v. - No. 92-7658

J. ARON & CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

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* Honorable Robert F. Peckham, of the United States District Court for the Northern District of California, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Sand's Opinion dated June 10, 1992. Plaintiff's efforts to distinguish this Court's decisions in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24-25 (2d Cir. 1990); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637 (2d Cir. 1989); and *Burdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1989) (per curiam), are unpersuasive. His reliance on *Stewart v. Jackson & Nash*, No. 92-7056, slip op. 6999 (2d Cir. Sept. 23, 1992), is misplaced since that case did not involve claims under RICO.

/s/Wilfred Feinberg

WILFRED FEINBERG, U.S.C.J.

/s/Amalya L. Kearse

AMALYA L. KEARSE, U.S.C.J.

/s/Robert F. Peckham

ROBERT F. PECKHAM, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LEO HAVILAND,

89 Civ. 8463 (LBS)

Plaintiff,

– against –

OPINION

J. ARON & CO.,

Defendant.

----------X

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HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

This Opinion, addressing defendant J. Aron's motion to dismiss, is not our first in this litigation. Plaintiff Leo Haviland commenced this action in December 1989, initially naming his former employer, Goldman, Sachs & Co. ("Goldman"), and its affiliate, J. Aron & Company ("Aron") as defendants. Defendants filed a motion to stay this proceeding pending arbitration before the New York Stock Exchange, which we granted as to Goldman but denied as to Aron. *See Haviland v. Goldman Sachs & Co.*, 736 F. Supp. 507 (S.D.N.Y. 1990), *aff'd*, 947 F.2d 601 (2d Cir. 1991), *cert. denied*, 118 L. Ed. 591 (1992). Plaintiff subsequently discontinued this action against Goldman, *see* Stipulation and Order dated January 7, 1992, so Aron is the only remaining defendant.

In the motion currently before this Court, Aron argues, *inter alia*, that Haviland's claims pursuant to the Racketeer Influenced and Corrupt Organizations ("RICO") Act should be dismissed because Haviland lacks standing to assert them.[1] In the event that we dismiss the RICO claims, Aron also contends that we should dismiss Haviland's claim of common law fraud for lack of federal jurisdiction. For the reasons that follow, we agree that Haviland lacks standing to assert the RICO claims and dismiss the complaint in its entirety.

I. BACKGROUND

Although the facts underlying this action have been set forth in prior opinions, we restate them because they are so essential to our discussion of RICO standing. Leo Haviland joined Goldman in 1979 and served as a vice president in Goldman's Energy Futures and Options Group ("Energy Futures") from April 1984 until the termination of his employment in February

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[1] Aron also moved to dismiss the RICO claims on the grounds that Haviland had failed to satisfy the "continuity" requirement and that the RICO statute was unconstitutionally vague. Because we find the standing issue dispositive, however, we need not address these alternative grounds for dismissal.

1989 In that role, Haviland earned commissions for Goldman by trading energy futures and options on energy futures on behalf of large refining and marketing firms, energy producers, and oil trading companies. According to the complaint, Haviland's efforts brought him "extensive, exclusive, and cofidential knowledge about the needs and plans of important players in the energy market." ¶ 2.

Aron is a partnership consisting of all Goldman partners through which the partners invest their own capital in various commodities and in foreign exchange. In 1984, Aron began trading as a principal in the energy futures, options, forwards and physical delivery markets. According to Haviland, Aron's entry into the energy market created a potential conflict of interest in that the confidential information he acquired from his clients about their future trading plans could be of enormous value to Aron. For example, if Aron knew that one of Haviland's clients intended to purchase a substantial amount of oil, Aron could attempt to enter the market before Haviland's client and later sell the oil at a profit.

Recognizing this potential conflict and convinced that "no significant client would have dealt with [Haviland] if they believed that [he] would disclose that client's plans . . . to another participant in the marketplace," Haviland expressed "grave concerns" to Goldman about the need to preserve his clients' confidentiality. ¶ 17. According to the complaint, Goldman responded to his concerns by making explicit, but false, promises that it would erect a "Chinese wall" between Energy Futures and Aron to prevent the disclosure of any confidential information to Aron. These misrepresentations, which were allegedly designed to deceive Haviland into thinking he could remain at Goldman and yet continue to act ethically, occurred from April 1984 until the spring of 1987 and were made to both Haviland and his clients.

Although the above statements were allegedly intended to defraud Haviland into remaining at Goldman, Goldman and Aron later shifted tactics. The complaint further asserts that from

July 1987 through January 1989, Goldman and Aron attempted to extort Haviland into divulging confidential client information. Specifically, Haviland asserts that on eight occasions, he was informed that increased cooperation between Energy Futures and Aron was necessary, and that his prospects and compensation at Goldman would be tied to such cooperation. Haviland claims that because he refused to provide the requested information, he was denied appropriate salary increases and ultimately fired in February 1989.

I. DISCUSSION

A. The Standard of Review

In reviewing Aron's motion to dismiss, this Court is required to accept the allegations in the complaint as true and to construe them in the light most favorable to Haviland. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Dacey v. New York County Lawyers Ass'n*, 423 F.2d 188, 191 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970). The complaint will be dismissed only if Haviland can prove no set of facts that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Goldman v. Belden*, 754 F.2d 1059, 1065 (2d Cir. 1985). Despite the liberality of this standard, only the "well-pleaded factual allegations" in the complaint must be accepted as true, *Papasan v. Allain*, 478 U.S. 265, 283 (1986), and we need not credit "baldly conclusory" statements that are unsupported by any factual basis. *Duncan v. AT&T Communications*, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).

B. Haviland's Claims for Relief

Haviland's complaint contains three causes of action. First, Haviland asserts a claim under 18 U.S.C. § 1962(c) of the RICO Act, which prohibits any person from conducting the affairs of an enterprise through a pattern of racketeering activity. Second, Haviland charges Aron with having conspired with Goldman to commit that substantive RICO offense in violation of 18 U.S.C. § 1962(d). Finally, Havilnd asserts a claim of common law fraud.

In fleshing out his RICO claims, Haviland states that Goldman and Aron formed an "association in fact" enterprise through which they engaged in a "pattern of racketeering activity" that was directed at him. The complaint divides the pattern of racketeering activity into two separate sub-schemes, each involving a different type of predicate conduct. In describing the first scheme, Haviland focuses on the alleged plan to defraud him into remaining at Goldman, and asserts that various misrepresentations made to Goldman's customers from April 1984 to the spring of 1987 amount to "thousands of violations" of the mail fraud statute, 18 U.S.C. § 1341 (Supp. 1992), and a more limited number of violations of the wire fraud statute, 18 U.S.C. § 1343 (Supp. 1992). In describing the second scheme, Haviland sets forth the alleged efforts to extort him into divulging confidential client information that occurred from July 1987 until his termination in February 1989. Haviland contends that these threats, combined with an allegedly inappropriate raise in 1987, a salary reduction in 1988, and his ultimate discharge in 1989, constituted attempted extortion in violation of the Hobbs Act.[2]

C. Standing Under Section 1964(c) and the Relevant Caselaw

In urging this Court to dismiss the RICO causes of action, Aron does not focus on the sufficiency of the predicate acts themselves. Instead, Aron argues that Haviland's claim is essentially one for "wrongful termination," and that courts in this Circuit and elsewhere have consistently held that the injury flowing from a retaliatory firing is insufficient to confer standing under RICO.

The right to maintain a private RICO action extends only to those "person[s] injured in [their] business or property

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[2] The Hobbs Act, 18 U.S.C. § 1951 (1984), punishes any person who:

> obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.

by reason of a violation of section 1962 of this chapter . . . " 18 U.S.C. § 1964(c) (emphasis added). Although the meaning of the "by reason of" language is not altogether intuitive, the Supreme Court has made clear that a " 'defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct.' " *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (citation omitted). Instead, a "plaintiff only has standing [under 1964(c)] if, and may recover only to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . ." *Id.* Thus, in order to have standing to sue under RICO, the alleged injury must be caused by a pattern of racketeering activity violating section 1962 or by individual RICO predicate acts, and the RICO pattern or acts must *proximately* cause the alleged injury. *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990); *see also Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992) (right to sue under RICO requires a direct, proximate relation between the injury asserted and the injurious conduct alleged). The RICO pattern or acts proximately cause a plaintiff's injury "if they are a substantial factor in the sequence of responsible causation and if the injury is reasonably foreseeable or anticipated as a natural consequence." *Hecht*, 897 F.2d at 23-24 (citations omitted).

Courts in this Circuit have had numerous opportunities to apply these generalized principles to employees' specific claims that they were fired or otherwise penalized for disclosing or refusing to participate in the allegedly unlawful actions of their employers. In each case, the courts have concluded that any injury flowing from the employer's retaliatory conduct was not sufficiently proximate to the alleged RICO violations to confer standing on the employee. *See, e.g., Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990) (no standing for employee alleging loss of employment and commissions resulting from his refusal to cooperate in employer's mail and wire fraud scheme); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989) (no standing for employees claiming harassment in retaliation for blowing the whistle on employer's violations of the Energy Reorganization Act); *Burdick v. American Express Co.*, 865 F.2d 527 (2d Cir. 1989) (per curiam)

(no standing for stockbroker who was allegedly fired and lost his client base for complaining about his employer's acts of mail and securities fraud); *Miller v. Helmsley*, 745 F. Supp. 932 (S.D.N.Y. 1990) (no standing for former president of brokerage firm claiming loss of salary and commission as well as forced resignation resulting from employer's predicate acts of extortion, mail fraud, and wire fraud); *Giuffre v. Metropolitan Life Ins. Co.*, 129 F.R.D. 71 (S.D.N.Y. 1989) (no standing for employee whose termination was the alleged "outcome" of scheme to defraud employer's customers); *see also O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989); *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988); *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201 (1st Cir. 1987); *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987) (all concluding that employee lacked standing to recover for injuries resulting from their reporting or refusal to participate in employer's alleged RICO violations).

The starting point for all of these "refusal to cooperate" decisions is the recognition that in order to have standing under RICO, a plaintiff must demonstrate that the harm he suffered is the direct result of a predicate act or the alleged pattern of racketeering activity. Many of the conclusions that the plaintiff lacked standing, therefore, were grounded on the determination that the alleged RICO violations were aimed at someone other than the plaintiff or that the asserted injury was too "remote" to be attributed to them.

In *Burdick v. American Express Co.*, for example, the plaintiff claimed to have been fired by his defendant-employer after protesting and refusing to participate in the employer's allegedly fraudulent activities. Beginning with the observation that Burdick could only establish standing if he showed "that the damage to his business or property resulted from the alleged mail and securities fraud," the Second Circuit first stated that any injury to defendant's *customers* – who were the intended victims of the defendants' frauds – could not be used to satisfy that requirement. 865 F.2d at 529. Noting that Burdick had also argued that the frauds had injured *him* by "interfer[ing] with [his] ability to service his customers, keep them happy and earn a living for himself," the Court nonetheless rejected this attempt to establish

standing on the theory that "this type of harm is simply too remotely related to the predicate acts of mail and securities fraud to support a claim under RICO." *Id.* Finally, the Court rejected Burdick's claim that he was discharged "as a result of" his complaints concerning the defendant's fraudulent activities. Relying on the First Circuit's decision in *Nodine v. Textron, Inc.*, the Court reasoned that any injury to Burdick's business or property flow from the defendant's decision to fire him, rather than from the pattern of racketeering activity in which the defendant engaged.[3] *Id.* (citing *Nodine*, 819 F.2d at 349).

In *Hecht v. Commerce Clearing House*, similarly, the plaintiff argued that because he refused to cooperate in the concealment of his employer's frauds upon the company's customers, he lost commissions as well as his job. Turning first to Hecht's claim that the racketeering conduct caused him to lose commissions, which was apparently pleaded in an attempt to differentiate the case from the line of cases declining to find standing for discharged employees, *see* 897 F.2d at 24 n.2, the Second Circuit stated:

> This injury is too speculative to confer standing, because Hecht only alleges that he would have lost commissions in the future, and not that he has lost any yet. *Even assuming that Hecht actually lost commissions, we hold that his injury was not proximately caused by violations of section 1962(c).*

897 F.2d at 24 (emphasis added). That holding was based on the observation that because Hecht was " 'neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s],' the injury to Hecht from

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[3] In addition, the *Burdick* Court rejected Burdick's suggestion that his claim that he was discharged as "an integral part of the illegal scheme, rather than in retaliation for reporting it," should make a difference in its standing analysis. Again relying on a decision of the First Circuit, the Court agreed that any differentiation between "preventive" and "retaliatory" dismissals would serve no useful purposes in this context. 865 F.2d at 529-30 (citing *Pujol v. Shearson/American Express Inc.*, 829 F.2d 1201, 1205 (lst Cir. 1987)).

customers' deciding to cancel subscriptions or to withdraw business upon discovering the frauds was not reasonably foreseeable as a natural consequence of the RICO violations." *Id.* (quoting *Sperber v. Boesky*, 849 F.2d 60, 65 (2d Cir. 1988)).

The Court next addressed Hecht's claim that his discharge was an overt act in furtherance of the alleged RICO conspiracy, and that his injury was therefore the direct result of the defendants' violation of 18 U.S.C. § 1962(d). Rejecting Hecht's argument that he had standing to assert this violation even in the absence of standing to assert the substantive violation, the Court explained:

> [S]tanding may be founded only upon injury from overt acts that are also section 1961 predicate acts, and not upon any and all overt acts furthering a RICO conspiracy. . . . Because the overt act of Hecht's discharge was not a section 1961(1) predicate act, his loss of employment does not confer civil standing.

Id. at 25 (citation omitted).

D. Application to Haviland's Allegations

With the above precepts in mind, we now review Haviland's allegations to determine whether they are sufficient to confer standing. Because the two alleged "sub-schemes" involve different types of predicate activity and different types of injury, we consider them each separately.

The Mail and Wire Fraud Allegations

The complaint first asserts that Aron participated in a three year scheme to defraud Haviland into remaining at Goldman by engaging in thousands of acts of mail fraud and a more limited number of acts of wire fraud. These violations are based on alleged misrepresentations made to Energy Futures' clients regarding Goldman's intention to prevent the disclosure of confidential information to Aron. Haviland alleges that the misrepresentations were made in one of two ways: either directly

by Goldman in advertisements or publications such as the Goldman annual report; or indirectly through Haviland in mailings, advertisements or telephone calls "that were either foreseeable to [Goldman and Aron] or explicitly authorized by [Goldman and Aron]." ¶ 67. Haviland contends that this scheme to defraud deprived him of the opportunity to leave Goldman at the height of his career to seek lucrative employment elsewhere.

In arguing that these allegations are sufficient to confer standing, Haviland does not take issue with the "refusal to cooperate" line of cases typified by *Hecht* and *Burdick*. He attempts to distinguish their holdings, however, on the grounds that the unlawful schemes alleged in those cases were directed at persons or entities other than the plaintiff, whereas this alleged scheme to defraud was directed at Haviland himself.

Having construed the facts alleged in Haviland's complaint in the most generous light available, we find ourselves unable to accept Haviland's characterization of the scheme at hand. As an initial matter, we question whether the alleged scheme injured plaintiff in his "business or property." Haviland concedes that Goldman and Aron took no steps to obtain confidential information from him during the timeframe of the alleged mail and wire frauds, and that the so-called "Chinese wall" was never in fact breached. *See* Transcript of Oral Argument Dated December 19, 1991 at 12-14 (hereinafter "Trans."). Thus, Haviland could have left Goldman at any time during the alleged scheme to defraud with his reputation and job prospects intact.

Even assuming an injury to Haviland's business or property, the *Hecht* and *Burdick* line of cases teaches that plaintiff can only establish standing by demonstrating that the predicate acts of mail or wire fraud *directly* deprived him of the opportunity to seek alternative employment. Since the alleged misrepresentations were made only to *clients* of Goldman, however, any proximate injury resulting from this scheme would have been to those clients rather than plaintiff. *Accord Miller v. Helmsley*, 745 F. Supp. at 938 (no standing where only plausible victims of predicate acts were "individuals and entities other than

Miller"); *Giuffre v. Metropolitan Life*, 129 F.R.D. at 75 (no standing where fraudulent scheme, to the extent it existed, would have been "directed to Metropolitan policy holders"). Haviland as much as concedes this point in acknowledging that "defendant's ultimate goal was surely to defraud Goldman's customers by secretly obtaining Haviland's confidential information." Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 24 (hereinafter "Pl. Mem.").

In rejecting Haviland's contention that "the illegal activity was directed only at [him]," Pl. Mem. at 24, we are influenced not only by the Supreme Court's instruction that we need not "accept as true a legal conclusion couched as a factual allegation," *see Papasan v. Allain*, 478 U.S. 265, 286 (1986), but by prior courts' willingness to look beyond the conclusory assertions in the complaint and examine the factual basis of plaintiffs' claims. In *Giuffre v. Metropolitan Life Ins. Co.*, for example, Judge Duffy carefully scrutinized the plaintiff's claim that his termination was not merely a "byproduct" of the defendant's racketeering activity, but was rather the intended goal of the alleged fraud. Judge Duffy rejected that contention and dismissed the RICO claims for lack of standing, writing:

> To accept the truth of [Giuffre's] allegations would be to give credence to what is simply an incredulous and unsupported assertion that Metropolitan established a nationwide fraudulent scheme for the sole purpose of firing Mr. Giuffre . . . . We are under no obligation to do so.

129 F.R.D. at 75. In this case, similarly, crediting Haviland's interpretation of the facts would force us to accept that Goldman and Aron perpetrated thousands of violations of the mail and wire fraud statutes for the purpose of inducing Haviland to remain at Goldman. Because we decline to do so, Haviland's attempt to establish standing on the basis of the alleged mail and wire fraud scheme must fail.

The Attempted Extortion Allegations

Haviland next argues that he has standing under the RICO statute by virtue of Aron's alleged violations of the Hobbs Act.

Specifically, Haviland asserts that Goldman and Aron pressured him to divulge confidential client information, and that when he refused to do so, Goldman gave him "a meager $17,000 raise, from $583,000 to $600,000, for 1987" (¶ 23), reduced his 1988 compensation by $100,000 to $500,000 (¶ 27), and summarily fired him in February 1989 (¶ 29). Just as he did in describing the alleged scheme to defraud, Haviland asserts that the Hobbs Act scheme was directed *at him* and that the resulting injuries were therefore sufficiently proximate to confer standing under RICO.

As an initial matter, and although Haviland contends that each request to divulge confidential information constitutes a separate violation of the Hobbs Act, we question whether the allegations in the complaint amount to more than one predicate act of attempted extortion. While Haviland contends that at least those threats accompanied by an intermediate adjustment to Haviland's salary give rise to separate violations, we are not convinced that that explanation is dispositive. *See* Trans. at 15.

Even assuming that Haviland's allegations could support multiple predicate acts of extortion, however, we find them insufficient to establish standing. In the first place, Haviland's insistence that he was the intended target of the scheme to obtain confidential information is simply belied by his concession that "defendant's ultimate goal was surely to defraud Goldman's *customers*." Pl. Mem. at 24. Whether or not plaintiff was the necessary source of such information, therefore, any proximate injury resulting from the alleged extortion would have been to Goldman's clients, and Haviland's own injuries would have been attributable to his refusal to participate in the allegedly fraudulent scheme. Since that type of injury is clearly insufficient to confer standing under the *Hecht* line of cases, Haviland's argument must fall.

Perhaps more important than Haviland's implausible assertion that he was the target of Aron's racketeering activity is the fact that the RICO claims appear to have been drafted in a conscious attempt to plead around the holdings of the "refusal to cooperate" cases. While we are mindful of our obligation to

assume the truth of Haviland's *factual* allegations on a motion to dismiss, we need not credit his legal conclusions or the labels he has selected for the predicate acts. With that definition of our task in mind, we find Haviland's allegation that he was penalized for refusing to yield to an attempted extortion to be indistinguishable from other employees' claims that they were penalized for refusing to join in an unlawful scheme *See, e.g., Hecht*, 897 F.2d at 22 (plaintiff claimed that he either had to "cooperate with the concealment of [the] frauds or lose his job"); *Norman*, 873 F.2d at 635-36 (plaintiffs claimed that they were "subjected to harassment and intimidation tactics" including false performance evaluations and demotions because they "threatened [defendant's] ability to hide the true state of affairs"). In short, the difficulty we have with crediting Haviland's assertion that the Hobbs Act allegations distinguish his case from the *Hecht* cases is that every one of the latter cases could also have been pled in this manner.

Having determined that the facts underlying Haviland's Hobbs Act allegations are materially similar to those underlying the "refusal to cooperate" cases, it is but a small step to our legal conclusion that Haviland also lacks standing to pursue those claims under the RICO statute. Other courts addressing the standing issue have displayed a similar willingness to question plaintiffs' claims that they were the "true" targets of their employers' unlawful activities.

In *Burdick*, for example, the Second Circuit rejected the plaintiff's attempt to allege a more proximate injury by claiming that he was discharged as "an integral part of the illegal scheme, rather than in retaliation for reporting it." *Burdick*, 865 F.2d at 529. Instead, the Court found that a distinction between "preventive" and "retaliatory" discharge would serve no useful purpose in the standing context, since in either instance the injury to a plaintiff flows from the employer's decision to fire the employee rather than the predicate racketeering activity. *Id.* at 529-30. In *Norman*, similarly, the Second Circuit found that the plaintiffs lacked standing to assert their claims of retaliatory harassment, despite their efforts to allege a proximate injury

by "seek[ing] to make themselves victims of [the defendant's] scheme." *Norman*, 873 F.2d at 636. In *Miller v. Helmsley*, the plaintiff went so far as to allege a "Fraudulent Scheme Against Miller." Judge Conboy rejected this transparent attempt to establish standing, however, finding that Miller's conclusory self-description as the target of the frauds could not defeat the fact that his employer was the direct target of the racketeering activity and any injury Miller suffered in the form of lost commissions or salary would have "trickled down" indirectly. *Miller*, 745 F. Supp. at 938. Finally, in the previously mentioned *Giuffre* case, Judge Duffy refused to credit the plaintiff's contention that the unlawful scheme was directed at him, noting that in order to do so, he would have had to accept the farfetched assertion that the defendant established "a nationwide fraudulent scheme for the sole purpose of firing [the plaintiff] . . . . " *Giuffre*, 129 F.R.D. at 75.

As the above excerpts reflect, courts addressing the issue of RICO standing in the context of "refusal to cooperate" claims have made clear that the proximate injury requirement for standing is a rigorous one, and that efforts to plead around it solely for the purposes of avoiding its impact will not be tolerated. A number of these courts have also articulated a rationale for their vigilance in this area: that "the purpose of civil RICO does not extend to deterring any illegal act such as retaliatory firings for which there are state and common law remedies." *Hecht*, 897 F.2d at 24; *see also Norman*, 873 F.2d at 637 ("Artful invocation of controversial civil RICO . . . cannot conceal the reality that the gravamen of the complaint herein is . . . harassment [under § 210 of the Energy Reorganization Act]"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 49 (lst Cir. 1991) (Even if defendant's conduct in firing the plaintiff was reprehensible, the RICO statute "cannot be used as a surrogate for local law . . . .").

In sum, it is clear that plaintiff's creative pleading simply cannot disguise the fact that the intended victims of the alleged scheme to defraud and attempted extortion were Goldman's clients, and that any injury Haviland suffered resulted from

his refusal to accede to the scheme rather than the racketeering activity itself. As such, Haviland's injuries are too remote from the RICO violations to be deemed "proximate" and he lacks standing to pursue them under the RICO statute.

III. CONCLUSION

For the reasons stated above, Haviland lacks standing to assert his claims under the RICO act and they are dismissed accordingly, without leave to replead. Because those claims provided the sole basis for Haviland's assertion of federal jurisdiction, Haviland's pendent claim of common law fraud is dismissed as well, without prejudice to its assertion in the state courts. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

SO ORDERED.

Dated: June 10, 1992
New York, New York

/s/
U.S.D.J.
U.S.D.J.

No. 92-1438

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEO HAVILAND,

Petitioner,

—v.—

J. ARON & COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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April 1, 1993

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether injury from a predicate act is an essential element of a RICO conspiracy claim under 18 U.S.C. § 1962(d)?

2. Whether employees discharged for refusing to participate in, or for "blowing the whistle" on, an allegedly fraudulent scheme directed at others have standing to bring RICO claims under 18 U.S.C. § 1962(c)?

RULE 29.1 STATEMENT

The parent company of respondent J. Aron & Company is The Goldman Sachs Group, L.P. The only subsidiary of J. Aron & Company that is not wholly owned is J. Aron & Company (Singapore) PTE.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Factual and Procedural Background 1

B. The Decisions Below 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. NO RICO CONSPIRACY CLAIM WAS RAISED IN THE COURT OF APPEALS OR DETERMINED BY ITS UNPUBLISHED ORDER 4

II. THE SECOND CIRCUIT'S HOLDING ON RICO STANDING UNDER SECTION 1962(c) IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Bowman v. *Western Automobile Supply Co.*,
985 F.2d 383 (8th Cir. 1993) 5, 6, 8

Carpenter v. *United States*,
484 U.S.19 (1987) 10

Cullom v. *Hibernia Nat'l Bank*,
859 F.2d 1211 (5th Cir. 1988) 5, 8

EEOC v. *Federal Labor Relations Auth.*,
476 U.S. 19 (1986) 4

FTC v. *Grolier, Inc.*,
462 U.S. 19 (1983) 4

Hecht v. *Commerce Clearing House, Inc.*,
897 F.2d 21 (2d Cir. 1990) 5, 7, 8, 9

Holmes v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992) 3, 6, 7

IRS v. *Federal Labor Relations Auth.*,
494 U.S. 922 (1990) 4

Kramer v. *Bachan Aerospace Corp.*,
912 F.2d 151 (6th Cir. 1990) 8

Page(s)

Miranda v. *Ponce Federal Bank*,
948 F.2d 41 (1st Cir. 1991) 5, 7, 8, 9

Morast v. *Lance*,
807 F.2d 926 (11th Cir. 1987) 5

O'Malley v. *O'Neill*,
887 F.2d 1557 (11th Cir. 1989),
cert. denied, 496 U.S. 926 (1990) 8

Reddy v. *Litton Indus., Inc.*,
912 F.2d 291 (9th Cir. 1990),
cert. denied, 112 S. Ct. 332 (1991) 3, 4-5, 8

Reves v. *Ernst & Young*,
61 U.S.L.W. 4207 (Mar. 2, 1993) 6

Rogers v. *Lodge*, 458 U.S. 613 (1982) 4, 6

Rose v. *Bartle*,
871 F.2d 331 (3d Cir. 1989) 7

Schiffels v. *Kemper Financial Services, Inc.*,
978 F.2d 344 (7th Cir. 1992) 6-7

Shearin v. *E.F. Hutton Group, Inc.*,
885 F.2d 1162 (3d Cir. 1989) 6, 8, 9

Page(s)

Statutes

18 U.S.C. § 1961(1) 5

18 U.S.C. § 1962(c) . . . . . *passim*

18 U.S.C. § 1962(d) . . . . . *passim*

Rule

Second Circuit Rule § 0.23 4

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Factual and Procedural Background

Following his discharge from employment by Goldman, Sachs & Co., petitioner sued Goldman Sachs and respondent, a wholly owned affiliate of Goldman Sachs, under RICO and for fraudulent misrepresentation. He subsequently dismissed his claims against Goldman Sachs with prejudice.

Petitioner alleges that Goldman Sachs, after assuring him and its customers that it would not do so, pressed him to divulge confidential information to respondent about customer trading in energy futures, supposedly to enable respondent, which traded for its own account, to benefit at the customers' expense. He admits that no such breach of customer confidences ever occurred. (A-12).

In crafting his RICO claims, petitioner did not allege that the assurances given to him in person violated the mail or wire fraud statutes. Instead, he contends that the assurances made to the *customers* of Goldman Sachs through the use of the mails or wires were predicate acts in furtherance of a racketeering scheme to defraud *him* into foregoing other, unspecified employment opportunities and remaining at Goldman Sachs. (Complaint, ¶¶ 18, 67). He also asserts that, because he refused to provide respondent with confidential customer information, he received a "meager" raise, had his pay cut and was finally discharged, in violation of the Hobbs Act. (¶¶ 23, 27, 28).

B. The Decisions Below

The district court (Leonard Sand, J.) rejected petitioner's attempt to circumvent the settled law of the Second Circuit (and elsewhere) holding that employees discharged for refusing to participate in a scheme directed at others cannot sue under RICO. (A-12-A-13). According to the court: "[I]t is clear that plaintiff's creative pleading simply cannot disguise the fact that the intended victims of the alleged scheme to defraud and attempted extortion were Goldman's clients, and that any injury Haviland suffered resulted from his refusal to accede to the scheme rather than the racketeering activity itself." (A-16-A-17).

In an unpublished order, the Second Circuit "affirmed substantially for the reasons" in the district court's decision and found "unpersuasive" petitioner's "efforts to distinguish" dispositive precedent. (A-2).

SUMMARY OF ARGUMENT

Petitioner seeks to invoke this Court's plenary jurisdiction to the end of "federalizing" under RICO a vast body of employment law long the province of the States. The end is a mistaken one and does not warrant plenary consideration.

The Court declined last Term to consider the supposed conflict among the circuits regarding the necessity of tracing RICO injury to a predicate act—as opposed to any overt act that furthers a conspiracy—in an action brought under 18 U.S.C. § 1962(d). *See Reddy* v. *Litton Indus., Inc.*, 112 S. Ct. 332 (1991). This case does not provide a suitable occasion for revisiting that decision: Petitioner did not present the conspiracy issue to the court of appeals, the court of appeals did not address it, and the unpublished order issued by the court of appeals is without precedential authority.

The second issue presented does not warrant plenary review because the ruling below that petitioner lacked standing under 18 U.S.C. § 1962(c) to sue for collateral injuries arising from an alleged scheme directed at others is in full accord with this Court's decision in *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992), and the decisions of all the circuits (see cases cited at page 8, *infra*). Petitioner's real attack is not on the court of appeals' articulation of the law but on its application of the law to the allegations of his complaint. The court of appeals' rejection of petitioner's pleading sophistry presents no issue for this Court.

ARGUMENT

I.

NO RICO CONSPIRACY CLAIM WAS RAISED IN THE COURT OF APPEALS OR DETERMINED BY ITS UNPUBLISHED ORDER.

From the start, this case has been concerned solely with petitioner's substantive RICO claim under section 1962(c)—the second question presented here. While petitioner referred briefly in a footnote in his district court brief to his § 1962(d) RICO conspiracy claim, he did not raise that claim in the court of appeals.

This Court's "normal practice" is to "refrain from addressing issues not raised in the Court of Appeals." *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted); *see, e.g.*, *IRS* v. *Federal Labor Relations Auth.*, 494 U.S. 922, 933 (1990); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982). Moreover, this case was decided below in an unpublished order, a procedure used by the Second Circuit when "no jurisprudential purpose would be served by a written opinion." Second Circuit Rule § 0.23. Such orders "shall not be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court." *Id.* This decisional posture makes even less warranted a departure from this Court's "normal practice" of refusing to review an issue not raised below.

In addition to the deficiencies of this case as a vehicle for review of the same section 1962(d) issue that the Court declined to review last Term in *Reddy* v. *Litton Indus., Inc.*,

112 S. Ct. 332 (1991), other considerations counsel against review at this time:

1. The First, Second, Eighth and Ninth Circuits have all held that an injury from a RICO predicate act is the *sine qua non* for standing to pursue a claim for alleged RICO conspiracy under section 1964(d). *See Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Bowman* v. *Western Auto Supply Co.*, 985 F.2d 383, 387 (8th Cir. 1993); *Reddy* v. *Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 332 (1991).

The Second Circuit ruled in *Hecht* that "Congress did not deploy RICO as an instrument against all unlawful acts. It targeted only predicate acts catalogued under section 1961(1)." 897 F.2d at 25. "Because the overt act of Hecht's discharge was not a section 1961(1) predicate act, his loss of employment does not confer civil standing." *Id.* In *Miranda*, the First Circuit similarly reasoned that because "Congress painstakingly enumerated a complete list of predicate acts," allowing plaintiffs to sue for other acts simply by alleging a conspiracy "would be tantamount to rewriting the statute." 948 F.2d at 48.

This majority view is supported by Fifth and Eleventh Circuit decisions that, although not focusing on section 1962(d) standing separately from other 1962 subsections, have dismissed section 1962(d) conspiracy claims on the ground that employees who are discharged for failing to participate in an alleged RICO violation cannot bring a RICO claim for loss of employment. *See Cullom* v. *Hibernia Nat'l Bank*, 859 F.2d 1211, 1213, 1217 (5th Cir. 1988); *Morast* v. *Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987).

Against this authority in six other circuits, the Third and Seventh Circuits have held that a RICO conspiracy claim need not rest on injury from a RICO predicate act. *See Schiffels* v. *Kemper Financial Services, Inc.*, 978 F.2d 344, 348-51 (7th Cir. 1992); *Shearin* v. *E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-70 (3d Cir. 1989). But *Shearin* antedates, and *Schiffels* fails to appreciate fully the significance of, this Court's decision in *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992).

The Eighth Circuit, in recently rejecting the Third and Seventh Circuit's approach to RICO standing, stressed that *Holmes* "has imposed limitations on standing by rejecting a but-for causation requirement and applying a more restrictive proximate causation requirement between the injury and the harm alleged." *Bowman* v. *Western Auto Supply*, 985 F.2d at 387. Thus, the Eighth Circuit held that "[i]mposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute." *Id.*

Moreover, the considerations supporting the majority view were recently reinforced by this Court's consideration of RICO's "liberal construction" clause in *Reves* v. *Ernst & Young*, 61 U.S.L.W. 4207 at 4211 (Mar. 2, 1993) (clause "is not an invitation to apply RICO to new purposes that Congress never intended"). The Court in *Reves* plainly undermines the Seventh Circuit's position in *Schiffels* that "limit[ing] standing to sue for RICO conspiracy only to those injured by predicate acts [is] inconsistent with [the 'liberal construction' clause]." 978 F.2d at 350. *See also Shearin*, 885 F.2d at 1170 (same).

2. This case is distinguishable from *Schiffels* and *Shearin*. In those cases, the plaintiffs alleged that they were

"fired to prevent . . . the conspiracy [from] unravel[ing]." *Schiffels*, 978 F.2d at 351; *see Shearin*, 885 F.2d at 1168 (plaintiff "claims that she was fired to preserve [ongoing] fraud when she stated that she would not participate"). Here, on the other hand, petitioner was allegedly fired "simply to retaliate for his refusal to go along." *Schiffels*, 978 F.2d at 351; *see* Complaint, ¶ 28. The complaint does not allege that he was fired to preserve an *ongoing* fraud, since it concedes that no confidential customer information was ever misused.

3. Petitioner's RICO "conspiracy" claim—directed at two parts of a single firm—was not framed with any particularity. The complaint alleges, without more, that "[d]efendants conspired, in violation of 18 U.S.C. § 1962(d) to violate § 1962(c), because they each agreed to participate in the Goldman/Aron Enterprise by agreeing to commit two acts of racketeering as set forth above." (Complaint, ¶ 75). A RICO conspiracy claim alleged in wholly conclusory terms cannot overcome a motion to dismiss. *See*, *e.g.*, *Miranda*, 948 F.2d at 48; *Hecht*, 897 F.2d at 25-26; *Rose* v. *Bartle*, 871 F.2d 331, 366 (3d Cir. 1989).

II.

THE SECOND CIRCUIT'S HOLDING ON RICO STANDING UNDER SECTION 1962(c) IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

The second question put forward in the petition—which was the sole focus of petitioner's complaint and his papers below—is patently unworthy of review. In keeping with *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992), the law in the Second Circuit and elsewhere is

clear: Employees discharged for refusing to participate in, or for "blowing the whistle" on, an allegedly fraudulent scheme *directed at others* do not have standing to bring a RICO claim under section 1962(c). *See, e.g., Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990); *Bowman* v. *Western Auto Supply Co.*, 985 F.2d 383, 384 (8th Cir. 1993) ("circuit courts . . . are in agreement that an employee discharged for criticizing or refusing to participate in the employer's racketeering activity lacks standing to bring a civil suit when the underlying violation is based on section 1962(a)-(c) of RICO"); *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 47 (1st Cir. 1991); *Reddy* v. *Litton Indus., Inc.*, 912 F.2d 291, 295 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1332 (1991); *Kramer* v. *Bachan Aerospace Corp.*, 912 F.2d 151, 155 (6th Cir. 1990); *O'Malley* v. *O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Shearin* v. *E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1167-68 (3d Cir. 1989); *Cullom* v. *Hibernia Nat'l Bank*, 859 F.2d 1211, 1218 (5th Cir. 1988).

While not disputing this overwhelming authority, petitioner claims that "none of these cases involved claims similar to those made by Haviland, *i.e.*, that he was the intended victim of defendant's racketeering." (Pet. at 17). In fact, in those cases plaintiffs argued in one way or another that their discharge was part of or required by the alleged racketeering scheme. Moreover, the cases all make clear that, if the *facts* alleged by plaintiff show that the purported scheme was ultimately *directed* at persons or entities other than plaintiff, no amount of conclusory pleading can save the complaint. Here, petitioner fatally concedes that respondent's "ultimate goal was surely to defraud Goldman's customers by secretly obtaining Haviland's confidential information." (Pet. at 18).

In an effort to show that his discharge was the direct result of a RICO violation, petitioner contends that respondent's alleged "goal could only have been accomplished by first succeeding in the plan (a) to defraud Haviland into staying at Goldman and (b) then extorting him into participating in planned illegal activity." (Pet. at 18). While petitioner alleges what are in effect "sub-schemes" directed against him, his complaint is still no different from those in which other discharged employees have sought—unsuccessfully—to bring RICO claims against their former employers. Indeed, he alleges that he was discharged "[a]s a result" of his refusal to join in the fraudulent scheme *directed* at Goldman Sachs' customers. (Complaint, ¶ 28). The courts of appeals have consistently refused to allow ex-employees to bring RICO actions based on allegations that they were victims of sub-schemes that were part of broader schemes directed at others. *See*, *e.g.*, *Miranda* v. *Ponce Federal Bank*, 948 F.2d at 47; *Hecht*, 897 F.2d at 24; *Shearin*, 885 F.2d at 1167-68.

Petitioner cannot cite a single circuit court decision taking a contrary position. In fact, petitioner chiefly argues that the law of the Second Circuit, as expressed in *Hecht*, was not correctly applied by that court in his case, contending that "application of the standard set forth in cases such as *Hecht* inexorably leads to the conclusion that [he] has standing." (Pet. at 16). His contention—which essentially criticizes the Second Circuit's reading of what petitioner believes is a cleverly crafted and unique pleading—presents nothing for review here.

Moreover, petitioner's two sub-schemes are flimsy, contradictory and inadequate attempts to plead around the uniform law on RICO standing. The complaint does not allege that any of the communications to petitioner or Goldman Sachs' customers during the life of the alleged mail

fraud scheme were misleading. (A-12). His Hobbs Act allegations are also completely inadequate because he cannot allege that respondent extorted property from him. While petitioner claims otherwise (Pet. at 18), the information that respondent and Goldman Sachs purportedly wanted—information about the trading of Goldman Sachs' clients—did not belong to him, but to his employer, Goldman Sachs. *See Carpenter* v. *United States*, 484 U.S. 19, 26 (1987).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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